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Hong Kong ban on IVF for unwed is discriminatory, say critics

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Hong Kong law prevents single women and unmarried couples from using assisted reproductive technology. It's a restriction that's being called outdated and discriminatory

More than 30 years ago, in an experimental procedure called in vitro fertilisation (IVF), doctors joined a woman's egg and a man's sperm in a glass dish in a laboratory. Nine months later, in July 1978, the first test-tube baby was born. These days, IVF is just one of several options for assisted reproductive technology to help women have a baby.

Despite advances in fertility treatments, heaven forbid you're a single woman in Hong Kong because, until you legally marry a man, you're not entitled to make use of that technology.

The Human Reproductive Technology Ordinance, passed in 1997, dictates that fertility treatment in Hong Kong can only be offered to heterosexual married couples. But that legislation could possibly change as the Equal Opportunities Commission is in the midst of completing a public consultation on the review of discrimination law.

Of the 77-question consultation form that covered sex, family status, disability and race, question number 71 asked: "Do you think that: the Human Reproductive Technology Ordinance should be amended to remove a requirement that a person is married to be provided with IVF treatment; and the exception in the Sexual Discrimination Ordinance relating to reproductive technology should then be repealed?"

The three-month public consultation exercise was completed on October 31.

More than 100,000 submissions were received, including a number jointly-signed by groups of people. The commission says it will carefully analyse the opinions received with a view to submitting a detailed report with recommendations to the government by the second half of 2015.

Until changes to legislation regarding reproductive technology are made, non-married individuals in Hong Kong have been venturing abroad to get these reproductive procedures in countries such as Thailand, Taiwan and the US, where fertility laws do not prohibit non-married individuals.

Perhaps the most famous incident happened in 2010, when a photo of Henderson Land property tycoon Lee Shau-kee holding triplets by his bachelor son, Peter Lee Ka-kit, which prompted much media attention as the children were born via a gestational carrier in the US.

Dr Louis Chan Yik-si of the Hong Kong Reproductive Medical Centre says that upon discovering this legal impediment, some cohabiting couples dash to the altar.

"These long-time couples come in for help and I have to tell them, 'We cannot do anything for you,'" says Chan. "They'll come back a week later saying, 'We just got married three days ago.'"

Winnie Chow, partner and collaborative practitioner at Hampton, Winter and Glynn, says the law is entirely outdated and not in line with societal views.

"The law seems to imply that being married immediately makes you a better parent. I always thought the true test is on the individual," she says.

The ordinance was drafted in the late 1980s - when the median age of first marriages was 28.3 for men and 25.6 for women - and passed in 1997 after public consultations. In 2001, the Council of Reproductive Technology was established to police the provision of reproductive procedures.

Little about the ordinance has changed since. Meanwhile, the city has one of the lowest birth rates in the world at 1.28 children per woman of child-bearing age. A census report in 2012 found the average age in Hong Kong that women got married (for the first time) was 30.5 years, and 31.1 years for men. Women are having children later: the median for the first childbirth at 30.5 years old.

Fertility issues arise as women have children later. Chan explains the time-sensitive nature of a woman's fertility window: by age 37, more than 90 per cent of a woman's eggs would have died; a woman over 40 has a miscarriage rate of around 50 per cent compared to 15 per cent for a woman 30 or below.

Advances in fertility technology have been able to manipulate the fertility window; for example, in oocyte cryopreservation, where a woman's unfertilised eggs are stored in ice (ideally, it has been extracted during her prime) so it can be used later.

Winnie Chok,
matrimonial
lawyer

In Hong Kong, however, while non-married individuals can have their eggs or sperm frozen for future use, clinics can't impregnate patients with those eggs unless the woman is married - plus, she has to prove there's an infertility issue to use these procedures.

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Chow says the ordinance is stuck at societal norms and the technology of decades ago.

"We're much more open minded [now], we're less conservative as single parent families are more prevalent and so are same-sex relationships. Even our Adoption Ordinance is more open-minded now as it allows single parent adoption."

She finds the ordinance's restrictions "discriminatory" and lists various legislations it potentially violates. That includes Article 1 of the Bill of Rights which states that men and women should have equal right to enjoyment of all civil political rights set forth in this bill, and the rights to recognise in this bill shall be enjoyed without distinction of any kind, such as race, colour and "other status".

Additionally, Article 14 states that no one should be subjected arbitrary or unlawful interferences with his private family, home or correspondence nor to unlawful attacks on his or her honour and reputation. Chow says prohibiting certain ART procedures to unmarried individuals could be seen as interference to his or her privacy and family life.

So why haven't these legal contradictions been raised in courtrooms if it clearly violates many laws? The ordinance has never been challenged.

It's a criminal offence for non-married individuals to venture overseas for fertility treatments such as IVF and surrogacy and so forth. Punishment is a HK\$25,000 fine and six months in prison for the first offence, and HK\$100,000 fine and two years in prison for the subsequent offence. These sentences however have not been meted out in courtrooms.

Asked about the dearth of action taken by the city in this respect, Legco legislator Dr Hon Leung Ka-lau says the authorities lacked jurisdiction over non-married citizens intent on having these procedures abroad.

"Because it requires controlling citizens behaviour outside the territory of Hong Kong, the police don't have the power to investigate outside Hong Kong. When you get some hearsay evidence, the Hong Kong police cannot prove it." Leung is sceptical of fertility law reform because he says "this is minor issue that would not be a priority of the government". Further, he says letting non-married individuals access assisted reproductive technology would weaken the institution of marriage.

Asked to comment on the burgeoning trend of non-married Hongkongers going abroad to get this service, Dr Gregory Leung Wing-lup, chairman of the Council of Human Reproductive Technology, says: "The welfare of the baby is paramount. Through some technology you bring this baby to this world, therefore there is a responsibility and welfare of the baby that should be given a lot of attention."

He adds that there's still a general belief in society that the traditional family (of married parents with their own biological children) is the best place to raise a baby.

The other side of the argument, he says, is that if a woman wants to have a baby through assisted reproductive technology, why can't she?

"We have these two different views, but at the moment I see no evidence it's shifting over to the other side, at least I don't think there's any pressure to raise this issue,"

says Gregory Leung.

Chan thinks the convening council would be reluctant to loosen these requirements involving marital status, because there are a lot of different viewpoints from different groups of people on this issue. For example, creating a child without a father is a real concern to this society, he says.

Hon Leung says this law should reflect what the majority of the community wants and "so far the majority of the community seems happy with the status quo".

"The public consultations from the Equal Opportunities Commission may prove us wrong but until then, the views we hear like what [Dr Gregory Leung] says is that there is really no pressure to put it on the agenda to change this fertility law."

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